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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 531 Misc.

GEORGE JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinions in the Court of Appeals (Pet. App. 11-27) have not yet been reported. The opinion of the District Court denying leave to proceed *in forma pauperis* is printed as an Appendix to this brief, *infra*, pp. 10-11.

JURISDICTION

The judgment of the Court of Appeals was entered on November 9, 1956. The time for filing a petition for

a writ of certiorari was, on December 8, 1956, extended by order of Mr. Justice Harlan, to and including January 9, 1957. The petition was filed on January 8, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case in which a district court on application to it for permission to appeal *in forma pauperis* had certified that the appeal was frivolous, lacking in merit, and not taken in good faith, the Court of Appeals properly denied motions to it for leave to appeal *in forma pauperis*, for the furnishing of a transcript, and for appointment of counsel.

STATUTE INVOLVED

28 U.S.C. 1915 provides in pertinent part:

> (a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a citizen who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.
>
> An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.
>
> (b) In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid

when authorized by the Director of the Administrative Office of the United States Courts.

* * * * *

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

STATEMENT

Petitioner and four other persons were indicted in the United States District Court for the Eastern District of New York on a seven count indictment charging them with stealing, forging, and uttering government checks. Petitioner alone stood trial. His four co-defendants, each of whom had pleaded guilty to two counts, testified for the government. Petitioner was represented by court-appointed counsel, described by the trial judge as "a capable lawyer of considerable experience." (Appendix, *infra*, p. 10).

Petitioner was convicted on all seven counts. Before imposition of sentence, but more than five days after conviction, petitioner sent to the trial judge a notice of motion for a new trial not prepared by his counsel. The court informed counsel of the motion and set the matter for hearing. Counsel made a formal motion for a new trial, not urging the grounds stated by petitioner in his notice. That motion was denied and petitioner was sentenced to three years' imprisonment on each count, the sentences to run concurrently.

The day after sentence, on May 26, 1956, petitioner *pro se* filed a notice of appeal to the Court of Appeals

and made application for leave to appeal *in forma pauperis*. In his affidavit he stated:

> Many prejudicial errors were committed against me, and I therefore need the records and minutes to present them to the United States Circuit Court of Appeals for the Second Circuit.

The District Court denied the application on June 1, 1956, setting forth the facts noted above and stating (Appendix, *infra*, p. 11):

> The issues in the case were simple. The jury was adequately and properly instructed as to the law. The evidence amply supported its verdict.
>
> I am satisfied, and accordingly certify that the appeal is frivolous, lacking in merit, and not taken in good faith.

On September 20, 1956, petitioner addressed to the Court of Appeals motions for leave to appeal *in forma pauperis*, for the furnishing to him of a transcript of the testimony, and for assignment of counsel. The Court of Appeals denied the motion. All three judges in the Court of Appeals agreed that, on the basis of the record before them, there were no facts which would justify failure to give effect to the trial judge's certificate of bad faith (Pet. App. at pp. 12-14, dissent on p. 21). Judge Frank, dissenting, expressed the view that counsel should be assigned to petitioner and that petitioner should be given leave to file a revised motion for leave to appeal *in forma pauperis* with the aid of counsel, utilizing appropriate methods for obtaining the equivalent of the transcript of testimony (see Pet. App. 17-21).

ARGUMENT

1. It is not clear from the petition whether petitioner is attacking the ruling of the court below denying leave to appeal *in forma pauperis*, a ruling in which all three judges concurred, or whether he is supporting only the position taken by the dissenting judge that counsel be appointed for petitioner to prepare a statement of the trial proceedings and present a revised motion for leave to appeal *in forma pauperis*. In so far as the first question may be pressed, we submit there is no reason for review by this Court. Whatever might be disclosed by further examination of the record, there is no present basis for disregarding the certificate of the trial judge that the appeal is in bad faith. Unless 28 U.S.C. 1915 is unconstitutional because it denies to defendants without financial means the right to prosecute frivolous appeals, no basis has been advanced for reversing that part of the order. However, it appears that even defendants with sufficient funds to pay court fees and employ counsel have no right to prosecute frivolous appeals. *United States* v. *Johnson*, 327 U.S. 106; *Sykes* v. *United States*, 224 F. 2d 313 (C.A. 4). There thus appears to be no reason why so reasonable a protection against the prosecution *in forma pauperis* of appeals which have no merit should be unconstitutional. Certainly some such protection is necessary since needy defendants, having not even the expense of appealing to lose, would otherwise press appeals in every case.

This Court held in *Wells* v. *United States*, 318 U.S. 257, that, in view of the statutory provision that an "appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good

faith" (*supra*, p. 2), the certification by the trial judge should be controlling "in the absence of some showing that the certificate is made without warrant or not in good faith." Otherwise the unsupported allegation of a defendant would be given more weight than the formal, deliberate, opinion of a district judge.

Nothing in the decision of this Court in *Griffin* v. *Illinois*, 351 U.S. 12, weakens the effect of *Wells*. In the *Griffin* case, the opinion of Justice Black, for four judges, noted that on the record the Court was bound to assume that "errors were committed in the trial which would merit reversal, but that the petitioners could not get appellate review of those errors solely because they were too poor to buy a stenographic transcript." 351 U.S. at p. 16. The concurring opinion of Justice Frankfurter noted that when "a State not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent," 351 U.S. at p. 24.

Here, the Court of Appeals was faced with what is manifestly a reasoned judgment of the trial judge that the appeal was frivolous and that to furnish a transcript of the record would be a waste of government money. Petitioner simply denied that this was so, without more. All the judges in the Court of Appeals recognized that this finding could not be disregarded without more of a showing than petitioner made in the Court of Appeals.

2. Judge Frank's dissenting opinion goes only to the question of whether petitioner should be assigned counsel to aid him in making a showing that the cer-

tificate of the trial judge was not issued in good faith, either by preparing a summary of the evidence as suggested by *Miller* v. *United States,* 317 U.S. 192, or by having the trial judge direct the official reporter to transcribe the notes free of charge for the judge, as suggested by *United States* v. *Sevilla,* 174 F. 2d 879 (C.A. 2) (Pet. App. 19-21). In effect, the dissent would make the transcript available to this defendant, despite the certificate of the trial judge and regardless of the merits of the case.

We think that the fallacy of the dissenting opinion lies in its failure to recognize that normally a defendant, who has been represented by counsel at the trial, has available to him a much less cumbersome means of showing that there is possible merit in the appeal. Trial counsel is in a position to indicate, without necessary reference to the transcript, possible bases for claims of error by the trial judge. We think that, before a district court is required to go through the elaborate proceedings suggested by the dissent, there ought, at the very least, to be some indication why trial counsel cannot assist a defendant in making out a case for attacking the certificate of the trial judge. If a showing is made that trial counsel is unable or unwilling to act, it may be necessary to assign new counsel to a defendant. But even if that becomes necessary we do not think that the transcript should be required until new counsel can assure the court that, after consultation with trial counsel and the government attorneys, he feels that the transcript is necessary for proper representation of the defendant. Otherwise, the protection against frivolous appeals and unnecessary costs, which the statute was designed to afford, would be for the most part meaningless.

Since no showing whatever was made as to why trial counsel could not assist petitioner in making a specific attack on the certificate of bad faith, we think the Court of Appeals was justified on the record before it in denying the request for assignment of new counsel. Not even in the petition for certiorari does petitioner attempt any explanation why trial counsel cannot be of help.

For this reason, the question presented by this case has none of the general importance which the petition for certiorari attaches to it. The Court of Appeals has not held that the certificate of the trial judge cannot be attacked. It has not held that counsel will never be assigned to a defendant to enable him to attack a certificate of bad faith. The case must be viewed on the basis of its particular record—the careful certificate of the trial judge, the fact that petitioner had counsel at his trial and does not explain such counsel's present unavailability, and the fact that petitioner's allegations reveal no substantial issue—on the basis of which there was no occasion to assign counsel for the purpose of attacking the certificate.[1]

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[1] The statistics offered by petitioner do not establish any general importance of the problem presented by the particular facts of this case. They show that in the District of Columbia Circuit, which has wider criminal jurisdiction than the other courts of appeals, leave to appeal was sought from the Court of Appeals in cases involving direct review (as distinguished from collateral attack) in only thirty-one cases. In twenty-three of those cases, the Court of Appeals apparently agreed with the District Court that the appeal was without merit; in eight, it did not. Whether or not a certificate of bad faith was filed in such cases does not appear. The figures do indicate, however, that the indigent defendants have found it possible to make a proper showing to a court of appeals when there is merit in an appeal.

Moreover, there is no occasion to review that issue at this time. Petitioner now has counsel appointed by the court below for the purpose of petitioning this Court for certiorari. If the Court should grant the petition and, on review of the matter, determine that petitioner was entitled to counsel, that would not result automatically in the grant of permission to appeal *in forma pauperis* but only in an effort, then to be commenced by counsel, to ascertain whether there was a bona fide basis for appeal. The rights of the petitioner will be equally well protected and the time of both the Court and counsel will be conserved if that task is commenced immediately.

We therefore respectfully suggest that the Court deny the petition as of this time without prejudice to its renewal after counsel shall have aided petitioner in determining whether he has a basis for appeal and, if he deems it appropriate, has resubmitted the motion to the court below.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied at this time.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

FEBRUARY, 1957.

APPENDIX

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

Cr. 44387

IN THE MATTER OF THE APPLICATION OF GEORGE JOHNSON FOR LEAVE TO APPEAL IN FORMA PAUPERIS FROM A JUDGMENT OF CONVICTION

RAYFIEL, J.

An indictment was filed against the above-named applicant and four other persons, charging them, inter alia, with conspiracy, and with stealing, forging and uttering Government checks.

The applicant pleaded "not guilty". The case proceeded to trial on the 3rd day of May, 1956, and continued until the 7th day of May, 1956, when the jury returned its verdict of "guilty" on all seven counts of the indictment. The applicant's four co-defendants, each of whom had pleaded guilty to two counts of the indictment, testified in behalf of the Government. During the trial the defendant was represented by Norman Johnson, Esq., a capable lawyer of considerable experience.

May 24, 1956 was set for the imposition of sentence. On May 15, 1956, after the expiration of the five day period provided therefor by Rule 33 of the Federal Rules of Criminal Procedure, I received from the defendant a notice of motion for a new trial, apparently prepared by someone other than his counsel. Accordingly the latter was informed of the receipt of the notice, and of the fact that I would hear argument

thereon on the date fixed for the imposition of sentence. On that date a copy of the notice of motion was exhibited to applicant's counsel, and he was asked if he wished to argue the motion. He made a formal motion for a new trial, not urging the grounds stated by the defendant in the notice. The applicant was then permitted to argue in his own behalf. I denied the motion for a new trial.

The defendant was then sentenced to serve a term of three years on each of the seven counts of which he had been convicted, the sentences to run concurrently.

He then made the instant application to appeal in forma pauperis from the judgment of conviction.

The issues in the case were simple. The jury was adequately and properly instructed as to the law. The evidence amply supported its verdict.

I am satisfied, and accordingly certify that the appeal is frivolous, lacking in merit, and not taken in good faith. Therefore the application is denied.

Dated: June 1, 1956.

(Signed) LEO F. RAYFIEL,
United States District Judge.